STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Michigan Court of Appeals
Hoekstra, P.J., and K. F. Kelly and Beckering, JJ.

HEATHER LYNN HANNAY,

Plaintiff-Appellee,

v

MICHIGAN DEPARTMENT OF TRANSPORTATION,

Defendant-Appellant.

_____/

Supreme Court No. 146763

Court of Appeals No. 307616

Court of Claims No. 09-116 MZ(A)

MICHIGAN DEPARTMENT OF TRANSPORTATION'S REPLY BRIEF

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INTRODUCTION

Bodily injury and excess wage loss are different types of injury. So too are bodily injury and loss of services. The Legislature waived the State's sovereign immunity only for bodily injury under § 5 of the GTLA. No waiver exists in § 5 for other categories of damage, such as excess wage loss or loss of services. Hannay therefore is not entitled to economic damages in the form of excess wage loss or loss of services against MDOT, a governmental tortfeasor.

The rationale of this Court in *Wesche* provides a proper foundation for limiting Hannay's damages to bodily injury. This Court's carefully crafted jurisprudence governing statutory construction prohibits engrafting a category of damages not selected by the Legislature into § 5. If additional damages are to be recoverable against governmental tortfeasors, such a change is best done by the policy-making branch of government, not by this Court.

Alternatively, if economic damages for excess loss are recoverable against MDOT, Hannay is entitled only to wages for the work she would have performed as a sales clerk or dental assistant at $10 per hour. The Court of Claims did not follow case law when it ruled that Hannay more likely than not could have earned $28 as a dental hygienist. Hannay had never even been admitted to the Lansing Community College dental hygienist program, let alone completed it, or obtained the requisite occupational license.

ARGUMENT

I. Excess wage loss and loss of services do not qualify as "bodily injury" under the rules of statutory construction reaffirmed in *Wesche*. The narrowly drawn motor vehicle exception in MCL 691.1405 bars Hannay's recovery of such economic damages, even if those damages result from the bodily injury.

Hannay's argument that the class of damages allowed by § 5 should be expanded, instead of limited, is at odds with the jurisprudence of this Court: "Governmental immunity is the public policy, derived from the traditional doctrine of sovereign immunity, that *limits imposition of tort liability* on a governmental agency." *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 155-156; 615 NW2d 702 (2000) (emphasis supplied). Consistent with this policy, courts have strictly construed § 5.

A. GTLA § 5 waives immunity only for bodily injury and property damage, not for excess wage loss or loss of services.

Hannay suffered several types of injury when the MDOT truck struck her. She received a physical injury to her shoulder requiring medical treatment. She suffered property damage to her vehicle. She experienced pain and suffering. She lost money because she was not able to return to work. And she lost the potential to earn money in the future. These five categories of damage exist in virtually every accident of this sort and were well known when the Legislature passed § 5. E.g., *Bishop v Plumb*, 363 Mich 87, 100; 108 NW2d 813 (1961) (quoting jury instructions in a traffic accident case addressing categories of damages including medical bills and hospital bills, pain and suffering, and "loss of earning capacity"). But the

Legislature chose, in § 5, to waive governmental liability only for the first two of those categories—bodily injury and property damage—not for all of them. No other type of damage is identified in § 5. Contrary to Hannay's argument, the "liable for bodily injury" language does not permit recovery of damages *caused by* bodily injury. Had this been the Legislature's intent, the Legislature would have selected this language.

Nor should this Court write such language into § 5. Doing that would result in the imposition of tort liability for damages not anchored in the text of § 5. Such language, if it will be added at all, is best left to the policy-making branch of State government. In other tort cases, this Court has recognized the Legislature as the most appropriate branch to change laws:

> We therefore leave it to the Legislature, if it chooses to do so at some future time, to more carefully balance the benefits of the current rule with what that body might come to view as its shortcomings. [*Price v High Pointe Oil Co,* 493 Mich 238, 263-264; 828 NW2d 660 (2013).]

Here, the Legislature has limited the type of damage for which the State may be liable to only bodily injury and property damage. In deciding what liability to subject the State to, the Legislature could quite reasonably conclude that it would waive immunity for bodily injury and property damage, but would not allow recovery for more speculative categories of damage, like pain and suffering or lost earning capacity. *Wesche*, 480 Mich. at 85 ("nonphysical injury . . . does not fall within the categories of damage for which the motor-vehicle exception waives immunity"). And this interpretation does not render § 5 a nullity, as Hannay

contends—it allows recovery for the two categories the Legislature allowed. Until the Legislature changes § 5, it should be read as it now exists.

B. *Wesche* is consistent with this Court's approach to statutory construction. The decision properly applies dictionary definitions to interpret "bodily injury."

This Court's decision in *Wesche* could not have been more clear. Bodily injury and property damages are distinct categories of damages recognized by GTLA § 5. And the waiver of immunity in § 5 is limited to only these two categories of damages:

> This language is clear: it imposes liability for 'bodily injury' and 'property damage' resulting from a governmental employee's negligent operation of a government-owned motor vehicle. *The waiver of immunity is limited to two categories of damage: bodily injury and property damage.* [*Wesche v Mecosta Co Rd Comm,* 480 Mich 75, 84; 746 NW2d 847 (2008) (emphasis added).]

Wesche defines bodily injury as a physical or corporeal injury to the body. *Wesche,* 480 Mich at 85. Hannay's call to ignore or even overturn the carefully crafted decision in *Wesche* should be declined. The economic damages awarded by the Court of Claims, and affirmed by the Court of Appeals, do not constitute a physical or corporeal injury to the body. For this reason, this Court should reverse the ruling of the Court of Appeals.

Stare decisis also supports keeping the law as it is. Lower courts and the practicing bar have relied on *Wesche's* rationale to guide decisions and advice to clients. See *Hunter v Sisco,* 300 Mich App 229, 240-241; 830 NW2d 753 (2013); *Conley v Charter Township of Brownstone,* unpublished opinion per curiam of the

Court of Appeals, issued January 16, 2014 (Docket No. 310971) slip op, p 1. (Attachment 1.)

II. Alternatively, if the bodily injury limitation in GTLA § 5 is interpreted to permit the award of excess wage loss, the record supports a $10 per hour rate of a sales clerk or dental assistant, which is work that Hannay was actually performing pre-injury. The record does not support a $28 per hour rate of a dental hygienist.

If the Court reaches this issue, it is an opportunity to clarify for the lower courts and practicing bar what the Legislature meant when it drafted § 3135(3)(c) and § 3107(1)(b) of the No-Fault Act to define work loss as "loss of income from work an injured person *would* have performed during the first three years after the date of the accident if he or she had not been injured." The record below shows that Hannay's pre-accident employment was that of a sales clerk and dental assistant. She earned $10 per hour. Although she had applied twice pre-accident to the Lansing Community College dental hygienist program, she had never been accepted. The trial court should not have awarded her the dental hygienist wage of $28 per hour.

A. The trial court used a legal standard not found in § 3135(3)(c) and § 3107(1)(b) of the No-Fault Act and incorrectly applied the law.

Hannay argues that the Court of Claims should not be reversed because the clearly erroneous standard has not been met. Because the trial court incanted the phrase "would more likely than not" as justification for its fact finding, Hannay claims that the appellate courts cannot have a definite or firm conviction that a mistake has been made. (Appellee's Brief, pp. 35-37, App. 71a-72a.) But the trial court's decision must be right on *both* the facts *and* the applicable legal standard to survive appellate review. The trial court's recitation of the magic words in the legal standard does not immunize its findings of fact and conclusions of law from appellate scrutiny. In *Lima Township v Bateson,* 302 Mich App 483, ___; 838 NW2d 898, 909 (2013) the Court of Appeals explained:

> In sum, the trial court abused its discretion by granting Lima injunctive relief in that it erred as a matter of law when it failed to make the requisite findings under the RTFA. *In re Waters Drain Drainage Dist,* 296 Mich App 214, 220; 818 NW2d 478 (2012) [stating that a court "by definition abuses its discretion when it makes an error of law"].

Also, in *People v Duncan,* 494 Mich 713, 723; 835 NW2d 399 (2013) this Court noted that a trial court necessarily abuses its discretion when it makes an error of law.

The Court of Claims found that Hannay "would more likely than not have been admitted into the Dental Hygienist program at LCC." (App. 71a.) This finding was made solely upon the testimony of Dr. Johnston and his wife, a dental hygienist who worked in Dr. Johnston's office. Hannay was a patient of Dr. Johnston, had

worked in his office as a dental assistant, and was highly regarded by Dr. and Mrs. Johnston.

But the *belief* that Hannay would eventually have become a dental hygienist and worked in Dr. Johnston's office at $28 per hour cannot overcome the facts. Hannay was not degreed or licensed as a dental hygienist. She was not even enrolled in the LCC dental hygiene program, having tried twice to be admitted. Hannay candidly acknowledges that the question of how she would have been employed "will remain at least to some extent in the realm of speculation." (Appellee's Brief, p. 37.)

B. Sections 3135(3)(c) and § 3107(1)(b) of the No-Fault Act only permit recovery of wages that Hannay actually earned pre-accident, not those in an occupation for which Hannay had never been trained, educated, or licensed.

The Court of Claims "would more likely than not" criteria does not appear in § 3135(3)(c) and § 3107(1)(b) of the No-Fault Act. There is a good reason for this.

If the "would more likely than not" criteria were in the statutory text, tort claimants could seek earnings in occupations for which they were never trained, educated, or licensed. The "would more likely than not" criteria would permit speculation on higher earnings and ignore actual pre-accident earnings. The "realm of speculation" would then become the norm.

But this is not what the Legislature intended when it defined work loss as "loss of income from work an injured person *would* have performed." The "would have performed" text limits wage loss to that supported by actual, not hypothetical,

earnings, pre-accident. This Court's decision in *MacDonald v State Farm* supports MDOT's position:

> A reading of both the clear language of § 3107(b) and the drafter's comment to the uniform act leads us to conclude that work-loss benefits are available to compensate *only for that amount that the injured person would have received* had his automobile accident not occurred. Stated otherwise, work-loss benefits compensate the injured person for income *he would have received* but for the accident. [*MacDonald v State Farm Mutual Ins Co,* 419 Mich 146, 151-152; 350 NW2d 233 (1984) (emphasis added).]

The amount that Hannay *would have* received is the $10 per hour she earned as a sales clerk and a dental assistant. Hannay *would not have* received $28 per hour as a dental hygienist. She was never employed as a dental hygienist pre-accident. And unlike the plaintiff's decedent in *Gobler v Auto Owners Ins Co,* 428 Mich 51, 55-56; 404 NW2d 199 (1987), she was not enrolled in college, awaiting a degree, with a confirmed job waiting.

The lower courts erred in awarding the $28 per hour rate.

CONCLUSION AND RELIEF REQUESTED

Hannay was not entitled to a judgment for economic damages in the form of excess wage loss and loss of services because GTLA § 5 waived MDOT's sovereign immunity only for bodily injury.

MDOT respectfully requests that the Court reverse the Court of Appeals and enter judgment in MDOT's favor on Hannay's claim for economic damages. Alternatively, MDOT asks that such economic damages be re-calculated at $10 per hour.

Respectfully submitted,

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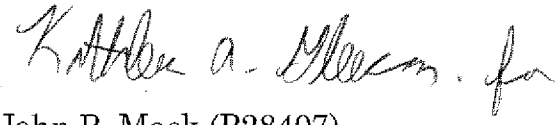

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